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Provisional summary record of the 3350th meeting
Held at the Palais des Nations, Geneva, on Wednesday, 3 May 2017, at 10 a.m.

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Programme, procedures and working methods of the Commission and its documentation

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Present:

Chairman:	Mr. Nolte
Members:	Mr. Al-Marri
	Mr. Argüello Gómez
	Mr. Aurescu
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Jalloh
	Mr. Kolodkin
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Valencia-Ospina
	Mr. Vázquez-Bermúdez
	Sir Michael Wood

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Crimes against humanity (agenda item 6) (*continued*) (A/CN.4/704)

Ms. Escobar Hernández said that the Special Rapporteur's third report on crimes against humanity (A/CN.4/704) contained a great deal of useful information, in particular on the international instruments upon which the Special Rapporteur had drawn in preparing the proposed draft articles. The proposals were based essentially on existing treaties — the majority in the area of contemporary international criminal law — and, to a far lesser extent, on legal writings concerning that sphere of law. The Special Rapporteur also referred to human rights instruments, which had a clear bearing on the Commission's work, considering the legal rights and interests it was seeking to protect by ensuring the prosecution of crimes against humanity. While the approach taken by the Special Rapporteur was a legitimate one, given that those international instruments were a part of the international practice on which the Commission's work must be based, several issues nonetheless arose in connection with that approach.

First, even though the report referred to a large number of legal instruments, the proposed draft articles drew upon no more than three or four conventions, at least two of which (the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime) concerned offences that were fundamentally different from the offences defined as crimes against humanity. Crimes in the latter category made up the "hard core" of crimes under international law; in other words, the most serious crimes of concern to the international community that outraged or shocked the conscience of humanity.

Secondly, the Special Rapporteur's preference for those instruments was not explained in the report, other than by factors such as the large number of States that had ratified them and States' familiarity with the mechanisms they established; those factors were not, in her view, sufficient in themselves to justify that preference. The implication was that basing the draft articles on those instruments would make them more likely to be readily accepted by States and quickly transformed into an international treaty. The report, however, offered no answers to such key questions as whether the wording of the provisions on which the draft articles were based was reflected in implementing legislation at the national level; whether those provisions had been applied in inter-State relations; and whether they had actually proved their effectiveness in addressing problems of international legal cooperation. Had such considerations been included in the third report, the Commission could have held a more in-depth discussion and based its decisions on factors that went beyond what could be seen as a copy-and-paste approach of choosing from among existing formulations. The Commission's primary concern was not to offer States draft articles that would easily gain acceptance, but to offer them draft articles that were as well founded as possible in terms of contemporary international law, taking into account the needs and interests of States in the matters under the Commission's consideration.

Thirdly, as a way of addressing that methodological difficulty, it would have been useful for the report to have included more analysis of international practice in the broadest sense, including decisions of international and national courts, the practice of other international bodies, examples of national legislation on the matters dealt with in the report, and the *travaux préparatoires* of the international instruments mentioned in the report. Such an analysis of practice would not necessarily be limiting for the Commission's work; it was useful and necessary even for the progressive development of international law and the formulation of proposals that departed from such practice. She trusted that the Special Rapporteur would be in a position to provide some examples of international practice, either in his summing-up of the debate or in the Drafting Committee and, in any event, in the commentaries to the draft articles.

Fourthly, it was important for the Commission to consider the objective and context of its work on crimes against humanity, especially in relation to the proposed draft articles. The Commission should bear in mind that the ultimate purpose of the draft articles was to prevent the occurrence and promote the prosecution of crimes against humanity and that, consequently, the cooperation and mutual legal assistance envisaged in that regard were intended only to serve as instruments for achieving that overall objective. The Commission

should consider whether draft articles 11 (Extradition) and 13 (Mutual legal assistance), in particular, were well suited to that purpose or whether they could cause States to lose sight of the ultimate aim of the draft articles as a whole. That comment was not intended to express either support for or opposition to what the Special Rapporteur called "long-form" articles, but only to draw attention to the question of where the lengthy provisions of such articles should be placed. For example, at the Commission's 3349th meeting, Mr. Park had raised the possibility of turning them into a protocol. In any case, diluting the substantive importance of the draft articles by overemphasizing matters exclusively relating to cooperation and international legal assistance would send a poor signal.

With respect to draft article 11, she shared the view expressed by Mr. Park at the preceding meeting, in relation to paragraph 1, that "extraditable offences" were the offences referred to in draft article 3, not draft article 5. She agreed with the Special Rapporteur that there was no need to include a dual criminality requirement in the draft article, and endorsed the exclusion of the "political offence" exception (para. 2) and the stipulation that the draft articles could be used as a basis for extradition (para. 3). Concerning that last point, the option given in paragraph 4 (a) should be discussed further, as it could weaken the draft article. In paragraph 6, the reference to a "minimum penalty" should be deleted, as crimes against humanity were subject to the most severe penalties, pursuant *inter alia* to draft article 5 (6). Paragraph 8 should be revised to broaden the concept of the territory in which the offence was deemed to have occurred for the purposes of extradition. Currently, paragraph 8 limited the definition of that territory to the cases enumerated in draft article 6 (1), even though draft article 6 (3) provided that the draft articles did not "exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law".

Regarding the extradition of a State's own nationals, referred to in paragraphs 9 and 10 of draft article 11, it was important to include an express reference to a State's obligation to prosecute a national who could not be extradited; it was insufficient, in paragraph 9, to refer to the general obligation set forth in draft article 9. She also had concerns about the wording of paragraph 10, which did not clearly spell out the obligations incumbent on a State that was requested to extradite one of its nationals for the purpose of enforcing a sentence; the paragraph seemed to afford such States a degree of discretion that was incompatible with the aim of the draft articles. Lastly, with regard to paragraph 11, she requested clarification of the phrase "prejudice to that person's position". The paragraph should perhaps be fleshed out in the Drafting Committee.

Draft article 12 (*Non-refoulement*) should be placed between draft articles 14 and 15, as it was not logically related to either draft article 11 (Extradition) or draft article 13 (Mutual legal assistance).

Draft article 13, which the Special Rapporteur described as a "mini mutual legal assistance treaty", was disproportionately long in comparison to the rest of the draft articles and included some contradictory elements. If the draft article was meant to constitute a fully fledged system of mutual legal assistance, it should be understood as a special regime that was to be applied in full, in preference to other rules, in cases involving crimes against humanity. Nonetheless, paragraphs 8 and 9 of the draft article departed from that model by establishing the primacy of existing mutual legal assistance treaties between the States concerned, merely indicating that States were "strongly encouraged" to apply draft article 13 if it facilitated cooperation. That preference for general agreements on mutual legal assistance would have been understandable if a "short form" of draft article 13 had been proposed, but was not warranted in the context of the "long form". If the "long form" was retained, draft article 13 should have primacy over other rules, except where a legal gap was identified or a general agreement on mutual legal assistance was more conducive to the achievement of the overall objective of the draft articles. Draft article 13 should therefore be revised in one of three ways: to make the "long-form" article applicable only in cases where no general agreement on mutual legal assistance was in force between the States concerned; to stipulate that the "long-form" article should take precedence over general agreements on mutual legal assistance, for the reasons she had outlined; or to adopt a "short-form" article that established the primacy of any existing mutual legal assistance treaties between the States concerned, provided that they did not contain provisions that

were incompatible with the object and purpose of the draft articles. Those options should be discussed in depth before draft article 13 was revised in the Drafting Committee.

With regard to draft article 14, she fully agreed on the necessity of addressing the issue of victims, witnesses and other affected persons in the draft articles, especially as the very serious and direct effects that crimes against humanity had on individuals were duly recognized in existing international instruments. She generally approved of the draft article's content. However, she would appreciate an explanation of the view, expressed in paragraph 168 of the report, that States should have latitude in determining exactly which persons qualified as "victims" of a crime against humanity. Although that view was not reflected in the draft article, such latitude might, depending on how it was interpreted, tend to weaken the obligations set forth in the draft article. It might be useful to address the issue in the commentary, so as to establish reasonable parameters within which States could exercise their discretion.

The indication, in draft article 14 (2), that victims' participation in criminal proceedings should be allowed by each State "subject to its national law" seemed extremely limiting. While she understood and shared the Special Rapporteur's wish to account for the diversity of national legal systems and models, the rules on victims' right to participate in proceedings should be more prescriptive, although they should respect the principles underpinning the national laws of States in terms of standing to take part in criminal proceedings. The Drafting Committee should consider wording that would take account of both of those elements. Lastly, she took the view, for the reasons expressed by previous speakers, that "guarantees of non-repetition" should not be included among the forms of reparation listed in draft article 14 (3).

With regard to draft article 15, she understood and shared the Special Rapporteur's concern to ensure the integrity and primacy of States' obligations under the constitutive instruments of competent international criminal tribunals, in particular the Rome Statute of the International Criminal Court. From the beginning of the Commission's work on the topic, she had highlighted the need to ensure that the draft articles did not conflict with the Rome Statute. However, she was not convinced that the wording of draft article 15 fully addressed that concern. At the Commission's 3348th meeting, Mr. Tladi had raised the matter of the primacy of national courts in the Rome Statute. Although she did not share that interpretation, as, in her view, the principle of complementarity pointed to another solution, there was clearly some basis to his concern. In addition, at the 3349th meeting, Mr. Hassouna had mentioned the need to ensure that the international tribunals in question complied with the fundamental principles of international justice. She wondered whether there might indeed be some international criminal tribunals whose constitutive instruments excluded a well-established principle such as the inapplicability of immunities before international criminal tribunals; the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) was one such instrument. The assertion of primacy, as established in draft article 15, thus posed various problems.

Moreover, the application of such a provision to the States parties to a future convention on crimes against humanity would entail difficulties if some of those States were parties to the constitutive instrument of a particular international tribunal and others were not. The Rome Statute itself did not go so far as to establish the primacy of the obligations it set forth over those under other international treaties. Articles 89 (1), 90 and 93 of the Statute established different rules in relation to the primacy of the obligation to cooperate with the International Criminal Court depending on whether or not the State in question was a party to the Statute. Those differentiated regimes applied in particular to the surrender of persons and other forms of cooperation, which were issues that were also regulated, *mutatis mutandis*, in draft articles 11 and 13, respectively. The most appropriate way to preserve the integrity and universality of the Rome Statute might thus be a simple "without prejudice" clause. Such clauses had already been used in other international instruments mentioned in the third report, as well as by the Commission itself and to similar ends. The alternative wording could be discussed in greater detail in the Drafting Committee.

With regard to draft article 16, she endorsed the proposal and justification given in the third report and had no further comments.

Although draft article 17 was limited to inter-State dispute settlement, that issue was analysed in the report alongside the equally important issue of monitoring mechanisms, on the basis of the excellent 2016 memorandum by the Secretariat on that subject (A/CN.4/698). However, the Special Rapporteur had adopted different positions on those two issues, addressing only the first in the draft articles. She had personally never fully understood the idea of establishing a specific mechanism for monitoring compliance with draft articles such as those under consideration. In her view, a meeting of States parties would be sufficient to fulfil that task. Nevertheless, it was unclear how other monitoring instruments within the human rights protection system would function in relation to the draft articles. In any case, as the Special Rapporteur himself noted, the issue had more to do with political negotiation than with the technical legal work of the Commission.

While draft article 17 was acceptable in the abstract, it exemplified the risks inherent in the copy-and-paste approach. She was not sure that the dispute settlement model proposed in it, which was patterned after existing models established by other treaties on criminal matters, was the most appropriate in the context of crimes against humanity. She had two concerns in that connection.

First, she was not convinced that it was necessary to establish a tiered system in which States that could not settle disputes through negotiation submitted them to arbitration before ultimately bringing them to the International Court of Justice. For articles on crimes against humanity, it would be preferable to establish a system involving only the International Court of Justice. However, there were other possibilities, such as a choice between arbitration and judicial settlement, or, where the jurisdiction of the International Court of Justice had not been accepted, mandatory arbitration. In any case, further analysis of practice was needed to evaluate the effectiveness, advantages and disadvantages of each option.

Secondly, a more serious concern related to draft article 17 (3), which allowed States to declare that they did not consider themselves bound by draft article 17 (2) and thus excluded arbitration and judicial settlement. While she recognized the voluntary nature of judicial settlement in contemporary international law, she did not consider that a provision of that kind should be included in a set of draft articles on crimes against humanity, the aim of which was to prevent and punish the commission of such crimes. Allowing States to formulate a reservation to the provision on dispute settlement would undermine both the obligation to combat impunity and the role of the International Court of Justice as a judicial reference body, to the detriment of efforts to promote the rule of law at the domestic and international levels, which was one of the goals of the United Nations. The Commission, as a subsidiary organ of the General Assembly tasked with the codification and progressive development of international law, should not make proposals of that kind. If the Commission was not certain of the need to establish a compulsory dispute settlement system, it should refrain from making any proposals in that regard, leaving the issue subject to the general rules on dispute settlement and, in any event, leaving any proposals and decisions on the matter to be made by States during the negotiation of a future convention, as was the Commission's usual practice.

There were two issues that, while highly important, had not given rise to individual draft articles, namely immunities and reservations. With regard to immunities, the Special Rapporteur stated that "the draft articles on crimes against humanity should not address the issue of immunity of State officials or officials of international organizations, and instead should leave the matter to be addressed by treaties on immunities for particular classes of officials and by customary international law", adding that his approach "should not be construed as having any implications for the Commission's work on 'Immunity of State officials from foreign criminal jurisdiction'". While she, as Special Rapporteur for that topic, was grateful for the Special Rapporteur's efforts to prevent conflict between the two sets of draft articles currently under consideration, she was not sure that the draft articles on crimes against humanity should not contain any reference to that other topic. At the very least, it should be left in abeyance until the Commission had come to a decision on the issue of limitations and exceptions to immunity, which was dealt with in her fifth report. In any

case, she wished to reiterate the comment made by Mr. Murase, at the Commission's 3349th meeting, on the need to include a rule on the irrelevance of official capacity in the determination of criminal responsibility for the commission of crimes against humanity. That rule was recognized in a number of international instruments, such as the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention on the Suppression and Punishment of the Crime of Apartheid and the Rome Statute. The Commission itself had included clauses on the irrelevance of official capacity in the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and in the draft Code of Crimes against the Peace and Security of Mankind.

The Special Rapporteur had chosen not to make a specific proposal on the issue of reservations, even stating in paragraph 326 of the report that "a complete prohibition might preclude the widespread adherence of States to the convention". While she agreed that, in line with the Commission's usual practice, the issue of reservations, like that of final clauses, should not be addressed in the draft articles, she wished to comment on the role that reservations could play in a future convention and to offer considerations that could be taken up by States at a later stage. To begin with, it was debatable whether an international treaty for the prevention and punishment of crimes against humanity should be subject to the ordinary regime of reservations. In her view, reservations should not be allowed in relation to the definition of crimes against humanity or the basic obligations of prevention, criminalization under domestic law and establishment of State jurisdiction over such crimes, nor should they apply to the basic elements of mutual legal assistance and cooperation, including extradition. Where reservations were considered necessary, the most coherent regime would, in her view, consist of a closed list of reservations; an obligation to indicate the reasons for a reservation, in particular effects on national legislation; and a system for monitoring reservations in force.

Concerning the draft preamble, the almost word-for-word reproduction of the preamble to the Rome Statute was perhaps unnecessary. Instead, it might be useful to include other references that would shed more light on the meaning of the new draft instrument. In any case, that minor point could be left to the Drafting Committee. She had no comments on the future programme of work and endorsed the Special Rapporteur's proposal in that regard. Lastly, she recommended that the draft articles should be referred to the Drafting Committee.

Mr. Reinisch said that he would address a few very specific points, some of which had already been raised in part by other Commission members. The Special Rapporteur's third report was unusually long, but it contained such a wealth of information that it was difficult to see how it could have been significantly condensed.

He noted that the United Nations Convention against Corruption had been used as a template for the very detailed proposed draft article 11 on extradition and that some members had questioned that approach, arguing that crimes of corruption and crimes against humanity were very different in nature. While acknowledging that difference, he considered that the particular type of crime addressed in a treaty was not necessarily a major consideration with regard to extradition obligations. As the article on extradition in the United Nations Convention against Corruption was very comprehensive and well balanced, it could serve as guidance for the draft articles under consideration. Of course, he did not wish to pre-empt a discussion of the extent to which modifications might be required.

With regard to draft article 16 on federal State obligations, he agreed that States should be prevented from making reservations that diminished their obligations under the draft articles. Indeed, in his view, the Commission should also discuss the possibility of including a general "no reservations" clause in the draft articles. While he had no firm view on the matter, it seemed to him that several of the draft articles, such as those on mutual legal assistance, extradition and inter-State dispute settlement, already contained often far-reaching opt-out provisions or other provisions allowing States to diminish their obligations. That suggested that any further unilateral limitations might be inappropriate and that reservations should perhaps not be allowed at all.

With regard to monitoring mechanisms and dispute settlement, he wondered why draft article 17 (2), which appeared to make the right to refer a dispute to an arbitral tribunal and ultimately to the International Court of Justice dependent on the impossibility of settling it through negotiation "within a reasonable time", reflected the language used in relatively weak dispute settlement provisions. In international dispute settlement, particularly under the former General Agreement on Tariffs and Trade system, such language had in practice often prevented effective dispute settlement by allowing States to insist that the "reasonable time" for negotiation had not yet elapsed. As draft article 17 (3) allowed States to opt out of any dispute settlement mechanism of an arbitral or judicial character, it seemed preferable to establish a specific time frame for negotiation, after which States would have the right to submit disputes to arbitration and ultimately to the International Court of Justice. Nevertheless, in the light of Ms. Escobar-Hernández's comments, he noted that the matter would depend on the final form of draft article 17.

Mr. Jalloh said that, having lived through a horrific war in his native country, Sierra Leone, he was very familiar with the dangers of crimes against humanity and considered that the Commission should do its utmost to strengthen the system of accountability for the perpetrators of core international crimes. The Special Rapporteur had made an impressive contribution to the Commission's efforts to address that scourge.

He generally endorsed the approach to the topic taken by the Special Rapporteur in his third report. He appreciated that, at a general level, the Special Rapporteur had relied considerably on provisions drawn from precedents derived from several transnational crimes conventions. However, while in some cases that might be appropriate, he cautioned that proper account must be taken of the specificities of crimes against humanity as core crimes under international law. The special nature of those grave crimes, which posed particular problems of enforcement at the national level, was clearly recognized by States in the preamble to the Rome Statute, which aptly characterized them as "grave crimes" that threatened "the peace, security and well-being of the world" and as the "most serious crimes of concern to the international community as a whole".

With regard to proposed draft article 11, he fully agreed with the Special Rapporteur's inclusion of what was essentially a "mini extradition treaty" within the draft articles, much like the "mini mutual legal assistance treaty" proposed in draft article 13. However, he urged the Special Rapporteur to consider the provisions of draft article 11 more carefully so as not to overlook some of the benefits that were to be gained from examining other conventions, as well as to ensure that they took into account the specificities of crimes against humanity.

He completely agreed with the Special Rapporteur that there was no need to include a dual criminality requirement, such as the one contained in article 44 of the United Nations Convention against Corruption, in draft article 11. The reasons for that position, as set forth in the report, were quite convincing and were further strengthened by the practice of States with respect to other stand-alone conventions on crimes such as torture and apartheid, which likewise did not contain a dual criminality requirement. On the issue of including crimes against humanity as extraditable offences in existing and future treaties, he was not entirely sure that there was, in fact, a need to retain the proposed language contained in draft article 11 (1). He largely shared the concerns that had been raised by Mr. Tladi on that issue at the Commission's 3348th meeting.

He fully concurred with the Special Rapporteur's view that the future convention on crimes against humanity should not include a political offence exception. While many transnational crimes conventions did include that exception, it was inappropriate in the context of crimes against humanity. The argument for excluding the political offence exception took on particular relevance with regard to the situation in many regions of the world where acts constituting crimes against humanity were committed in an attempt to preserve the interests of a particular ethnic group that was virtually equivalent to a political group. To endorse the political offence exception in such a context would undermine the nature of the crimes against humanity regime. Further evidence of the strong trend against the availability of the political offence exception for core crimes could be found in the database on rules of customary international humanitarian law that had been compiled by the International Committee of the Red Cross, specifically the information on State practice

relating to rule 161 on international cooperation in criminal proceedings. In addition, many of his concerns regarding draft article 11 were addressed in the report of Amnesty International containing its commentary to the third report on crimes against humanity.

With regard to draft article 12 on *non-refoulement*, he proposed that the words "territory under" in paragraph 1 and the words "in the territory" in paragraph 2 should be deleted. In addition, an emphasis on the exercise of jurisdiction on a basis other than that of territoriality could, in his view, bolster the impact and effectiveness of the future application of the *non-refoulement* provision.

Draft article 13, which constituted the so-called "mini mutual legal assistance treaty", should be regarded as a companion to the extradition clause set out in draft article 11, and the two should serve as the backbone of the future crimes against humanity regime in terms of ensuring its effectiveness. In view of the horrific nature of crimes against humanity, the reference, in paragraph 3 (k), to other types of assistance that were "not contrary to the national law of the requested State" seemed too limiting and should be deleted, since national legislation tended to be more restrictive and less progressive than it could be with regard to international crimes. He proposed that the list contained in paragraph 3 should be amended so as to expressly include, as forms of assistance, the provision of information on the identification and whereabouts of persons or location of items and the use of videoconferencing while taking evidence from persons or for the purpose of providing information, evidentiary items and expert evaluations. In paragraph 3 (d), the phrase "including the exhumation and examination of gravesites" should be added to the existing text. Furthermore, given the gravity of crimes against humanity, paragraph 8 should be recast in order to indicate that obligations under any other treaty, bilateral or multilateral, that governed or would govern, in whole or in part, mutual legal assistance were superseded by the draft articles on crimes against humanity.

Before concluding his comments on draft article 13, he wished to point out that article 72 of the Rome Statute of the International Criminal Court, which concerned the protection of national security information, provided a useful framework for State cooperation regarding information that could not be disclosed to the public but that States could provide to a competent tribunal by way of legal assistance. Such assistance had proved crucial for the conduct of prosecutions by ad hoc tribunals such as the Special Court for Sierra Leone, and the Commission might wish to review the practice of such tribunals in that regard. He proposed an addition to paragraph 20 indicating that the requested State could provide to another State materials that under its national law were not available to the general public for the purposes of carrying out investigations and prosecutions of crimes against humanity.

Draft article 14 set out a framework for the effective protection of victims, witnesses and other affected persons, whose participation was crucial for the successful prosecution of crimes against humanity. The proposed provision seemed to be based on contemporary international legal approaches to that subject, particularly in international criminal tribunals. The Special Rapporteur should perhaps consider breaking down some of the issues that were raised in the draft article. It was important to be mindful of the distinction between the place and status of victims in the human rights corpus versus their place and status in the international criminal law corpus, which could imply different sets of expectations from institutions. Doing so would help to strengthen the Commission's efforts to address the rights of victims, *inter alia* in respect of their participation in criminal proceedings.

It was regrettable that draft article 14 was fairly short. Although he endorsed the wording of paragraph 1 (a), he proposed that it should be supplemented with a clear obligation on States to examine the complaints referred to in the subparagraph in order to determine, in accordance with draft article 7, whether there were reasonable grounds for believing that acts constituting crimes against humanity had been or were being committed. With regard to paragraph 1 (b), the Commission should consider drawing inspiration from some aspects of the system that had been set up under the Rome Statute, such as the establishment of a victims and witnesses unit as a supplement to the future convention, especially if the crimes against humanity regime would be complementary to that of the Rome Statute, which seemed to be the approach preferred by States. The focus of paragraph 1 (b) on the protection of potential witnesses from intimidation should be reviewed. The

experience of international and internationalized criminal courts, as reflected in article 68 (1) of the Rome Statute, demonstrated that protection must also include broader measures to protect the psychological well-being, dignity and privacy of victims and provide support to those at risk. He had personally seen how vital such provisions had been to the success of the work of the Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda. Without such protection, many of the witnesses would not have testified, the persons ultimately responsible for the commission of crimes against humanity would not have been brought to justice and the victims would not have had the satisfaction of regaining their dignity in court. Paragraph 1 (b) would therefore be more comprehensive if it recognized the tremendous danger faced by people who testified against individuals who were, in many cases, the most powerful members of society, including heads of State.

Paragraph 2 was an excellent proposal, but it was critical to ensure victims' effective participation. Some guidance along those lines could be provided in the commentaries. The Commission could perhaps clarify in paragraph 2 that States must enable victims to present their views and concerns where their personal interests were affected, although the budgetary constraints that many States faced could hinder the implementation of such a rule. Paragraph 3 should further define the scope and extent of the reparations to which victims were entitled and should recognize that crimes against humanity often involved a large number of victims. The reparations programmes that States had established, often in consultation with victims, tended to be more expeditious and effective than the processing of reparations through the judicial system. However, reparation in the form of financial compensation posed a huge obstacle to many States, especially those where periods of bad governance had led to political turmoil, conflict and the commission of serious crimes, such as crimes against humanity. It was sobering to realize that even the International Criminal Court struggled to properly finance its Trust Fund for Victims and to fulfil its obligations under article 79 of the Rome Statute, with many States parties showing little inclination to donate the funds required.

Finally, with regard to victims, he proposed that the Special Rapporteur should consider article 45 (3) of the Malabo Protocol, which provided that the African Court of Justice and Human Rights could "invite and take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States".

Concerning draft article 15 on the relationship to competent international criminal tribunals, he agreed that it was necessary to avoid any conflict between the draft articles and States' rights and obligations with respect to such tribunals. The latter should be deemed to include not only the International Criminal Court, but also such future ad hoc tribunals as might be set up by the Security Council under Chapters VI or VII of the Charter of the United Nations, or by States in cooperation with regional organizations acting in compliance with current international law. As both the broad and the narrow approach discussed by the Special Rapporteur seemed eminently sensible, he did not share the concern expressed in paragraph 206 that a broad provision on potential conflicts might inadvertently undermine the draft articles, because it might be better to resolve any potential conflicts in favour of the competent international court.

The proposed draft article 16 on federal State obligations was essentially predicated on article 29 of the 1969 Vienna Convention on the Law of Treaties, which set forth the default rule of customary international law that a treaty was binding upon each party in respect of its entire territory unless a different intention appeared from the treaty or was otherwise established. He supported that draft article as a means of precluding the potential complications described in chapter VI of the report.

With regard to draft article 17 on inter-State dispute settlement, while he welcomed the fact that paragraphs 212 to 238 of the report built on the excellent memorandum by the Secretariat (A/CN.4/698) concerning existing treaty-based monitoring mechanisms which might be of relevance to the future work of the Commission, he was disappointed that the Special Rapporteur seemed to suggest, in paragraph 238, that the selection of a monitoring mechanism, a matter that was key to the integrity of the future convention, should be set aside and that the Commission should content itself with the mere possibility that States might choose one of the procedures listed in paragraph 230, namely reports by States parties; complaints, applications or communications by individuals; inter-State complaints;

inquiries or visits; urgent action; or presentation of information for meetings of States parties. Although the justification for that approach, that it was a policy matter best left to the decision of States, presumably because it raised issues of a political rather than a technical nature, was not problematic in and of itself, in the specific context of crimes against humanity it would be unfortunate if the Commission, which had great technical expertise on the matter, failed to produce any recommendation. He therefore hoped that some common ground could be found in order to enable the Commission to recommend a strong monitoring mechanism ensuring that the future convention was useful for States.

Draft article 17 was also somewhat problematic with regard to the vital issue of inter-State dispute settlement, because it drew on the inapposite context of conventions concerning transnational crimes. He tended towards the view that, as in the case of conventions regarding genocide and war crimes, the regime for dispute settlement in a convention on crimes against humanity should be judicial, even though Article 33 of the Charter of the United Nations enumerated a variety of peaceful means of dispute settlement. For that reason, he was opposed to creating a regime for opting in or out of the judicial settlement of disputes over the interpretation and application of a future convention on crimes against humanity. His concerns would be allayed if paragraphs 1 and 2 were amended to provide for the judicial settlement of such disputes before the International Court of Justice and if paragraphs 3 and 4 were deleted in their entirety.

As for chapter VIII, at first blush he would be inclined to agree with the Special Rapporteur that it might be wise to decouple the discussion of immunity for crimes against humanity from the wider consideration of immunity of State officials from foreign criminal jurisdiction, in order to avoid any perception that the Commission's position on one topic signalled its intentions with regard to the other. However, compartmentalizing the debate might deliver an unintended blow to the perceived status of immunity before national courts. Indeed, it was hard to see how the Commission could avoid considering the consistency or inconsistency of its position when it resumed its debate on the broader topic of immunity of State officials from foreign criminal jurisdiction. A more exhaustive discussion of the issue in the Special Rapporteur's report, including an examination of the case law of the International Criminal Court, the International Court of Justice and other tribunals, academic literature and a number of regional instruments, might have helped the Commission to identify current and historical trends concerning the status of immunity and to take an informed decision on whether to accept the Special Rapporteur's suggestion that the draft articles on crimes against humanity should not address the question of immunity. Acceptance of that suggestion was made all the harder by the fact that the Commission had played a vital role in the development of the thinking on core issues of immunity, as embodied in the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and in other substantive provisions that had eventually led to the idea that individuals' official capacity was largely irrelevant if they were being prosecuted for certain core international crimes. In fact, notwithstanding the case law of the International Court of Justice, as established *inter alia* by the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, there was nothing to prevent the Commission from endorsing a draft article along the lines of article 27 of the Rome Statute in order to do right by victims of atrocity crimes. That would serve to complement, rather than undermine, the regime of national prosecutions for crimes against humanity as part of the core crimes contemplated by the Rome Statute.

While he appreciated the useful discussion of amnesty in the report, as a former legal adviser in the Special Court for Sierra Leone he had difficulty with the apparent rejection of the Court's position, since that seemed to imply that, under the future convention on crimes against humanity, combatants, especially non-State armed groups, could rape, kill and maim and receive a blanket amnesty, as had happened under the 1999 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, and thereby avoid prosecution by national courts. As the caveat that one State's amnesty for an international crime did not bind another State was inadequate, he was in favour of including a limited provision indicating at the very least that, even though amnesties might not *per se* be prohibited by international law, States should not conclude

agreements containing blanket amnesties for crimes against humanity, which were impermissible.

With regard to the future programme of work, he would prefer the Commission to take its time and deal thoroughly with the subject rather than rushing through a first and second reading of the draft articles.

Returning to paragraph 26 of the report, he said that he was worried that the failure to include a provision on competing extradition requests might create problems for States parties to the future convention, especially as draft article 17 provided that disputes should preferably be settled by negotiation or, if that was to no avail, by arbitration; only if that also failed did States have the option, not the obligation, to refer them to the International Court of Justice. Article 90 of the Rome Statute specifically addressed that issue and set forth different rules depending on the identity of the requesting parties and the factual situation in which the requests were received. One solution which the Drafting Committee might like to consider would be to require the requested State to take account of the dates of the requests, the nature and gravity of the offences to which they referred (if different), the interests of each requesting State (including whether the offence had occurred in its territory and the victim's nationality) and the possibility of subsequent transfer between the requesting States. He therefore proposed that, in the future convention, the Commission should take an approach similar to that of article 90 of the Rome Statute and list the factors that requested States should consider in determining the State to which they would grant extradition in the event that they received concurrent requests. He would be submitting a detailed proposal for consideration by the Special Rapporteur and the Drafting Committee.

Although he had expressed some concerns about some of the draft articles, and would be opposed to retaining the possibility of reservations to a future convention on the topic, he was not opposed to referring the draft articles to the Drafting Committee.

Programme, procedures and working methods of the Commission and its documentation (agenda item 8)

Mr. Valencia-Ospina (Chairman of the Planning Group) announced that the Planning Group would be composed of Mr. Cissé, Ms. Escobar Hernández, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Mr. Jalloh, Ms. Lehto, Mr. Murase, Mr. Murphy, Mr. Nguyen, Mr. Nolte, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Park, Mr. Rajput, Mr. Reinisch, Mr. Šturma, Mr. Tladi, Mr. Vázquez-Bermúdez and Sir Michael Wood, together with Mr. Gómez-Robledo (Special Rapporteur) and Mr. Aurescu (Rapporteur), *ex officio*.

The meeting rose at 11.55 to enable the Drafting Committee on Provisional application of treaties to meet.